JOHN A. COOLEY

IBLA 77-325 Decided August 14, 1978

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring appellant's Vo No. 3 mining claim, located in the Papago Indian Reservation, null and void for failure to pay rent. A-9964.

Affirmed.

1. Accounts: Payments -- Act of June 18, 1934 -- Administrative Practice -- Indian Lands: Generally -- Mining Claims: Special Acts

   The holder of a mining claim located within the Papago Indian Reservation under Sec. 3 of the Act of June 18, 1934, 48 Stat. 984 (repealed, Act of May 27, 1955, 69 Stat. 67) is required to make the annual rental payment for the claim in advance (on or before the anniversary date of location of the claim). A decision invalidating a claim will be upheld where proceedings to void the claim are not initiated until several months after the rental due date, there is no evidence the rent was paid for the year, and appellant admits the failure to pay was an oversight.

APPEARANCES: John A. Cooley, pro se.

OPINION BY ADMINISTRATIVE LAW JUDGE STUEBING

John A. Cooley brings this appeal from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated April 7, 1977, declaring appellant's Vo No. 3 mining claim null and void. The claim was located in the Papago Indian Reservation on October 13, 1953. The decision of the BLM below declared the claim null and void because of the failure of appellant to make the annual rental

payment by the anniversary date of the location, October 13, 1976, as required by regulation. 43 CFR 3825.1(b).

Appellant alleges in his statement of reasons for appeal that he mailed a check, dated January 8, 1976, in payment of the rent for the Vo No. 3 mining claim and 27 other mining claims for the year 1976. His check was promptly returned by the Bureau of Indian Affairs (the agency to which rental payments for mining claims in the Papago Indian Reservation are made). The BIA explained in its letter of transmittal that the rent for each of the claims should be paid before the anniversary date of the location of the claim, but during the month when the payment for the given claim is due. Appellant asserts that he subsequently did this for 27 other claims, but he "somehow missed" the payment for the Vo No. 3 claim. It is alleged by the appellant that the Bureau of Indian Affairs (BIA) had previously accepted a single annual payment for his several claims such as he earlier submitted in this case.

A copy of the letter from the BIA to the appellant which accompanied the return of his check is in the case file. Attached to the letter, as an enclosure, is a list of appellant's mining claims showing the due date for the annual rental payment for each claim.

Authority for location of mining claims on Papago Indian Reservation lands prior to 1955 was provided by section 3 of the Act of June 18, 1934, 48 Stat. 984 (repealed, Act of May 27, 1955, 69 Stat. 67). Section 3 opened lands of the reservation to exploration and location under the mining laws of the United States and provided that a yearly rental of not to exceed 5 cents per acre shall be paid. The land in the reservation was subsequently withdrawn from all forms of exploration, location and entry under the mining laws by the Act of May 27, 1955, 69 Stat. 67, which repealed the pertinent provisions of section 3. However, the Act of May 27, 1955, specifically excepted those claims which had been validly initiated before the date of the Act and which were thereafter maintained under the mining laws of the United States.

The statute authorizing mining claims in the Papago Indian Reservation has been implemented in part by regulation at 43 CFR 3825.1(b) which provides as follows:

> In addition to complying with the existing laws and regulations governing the recording of mining locations with the proper local recording officer, the locator of a mining claim within the Papago Indian Reservation shall furnish to the superintendent or other officer in charge of the reservation, within 90 days of such location, a

> copy of the location notice, together with a sum amounting to 5 cents for each acre and 5 cents for each fractional part of an acre embraced in the location for deposit with the Treasury of the United States to the credit of the Papago Tribe as yearly rental. Failure to make the required annual rental payment in advance each year until an application for patent has been filed for the claim shall be deemed sufficient grounds for invalidating the claim. The payment of annual rental must be made to the superintendent or other officer in charge of the reservation each year on or prior to the anniversary date of the mining location. [Emphasis added.]

[1] The regulation clearly authorizes the BLM to invalidate claims for late rental payment, although it does not require invalidation in every instance. Charles Ketchum, 16 IBLA 82, 84 (1974); I. M. Clausen, 7 IBLA 286, 288 (1972). Accordingly, a decision regarding whether to declare a claim null and void for failure to make timely payment of rent involves an exercise of discretion. I. M. Clausen, supra at 288. We are unable to find an abuse of discretion where proceedings are initiated to invalidate a mining claim several months after the due date for the rental payment and no acceptable payment has been made prior to that time. See Charles Ketchum, supra at 85 (distinguishing I. M. Clausen, supra).

Appellant's allegation regarding the past practice of the BIA in accepting a lump sum advance payment for several mining claims is not persuasive. The past practice of the BIA in the manner of accepting rental payments does not constitute a waiver of violation of the regulation requiring rental payment in advance of the anniversary date which will provide a sufficient basis for reversing a decision voiding the claim. See I. M. Clausen, supra at 288-89.

The general rule regarding tender of payment is that an objection to a tender must be made in good time and the grounds of the objection must be specified. 74 Am. Jur. 2d Tender § 10 (1974); See Gaunt v. Alabama Bound Oil and Gas Co., 281 F. 653 (8th Cir. 1922). The BIA carefully explained their procedure with respect to rental payments in the letter returning appellant's lump sum check on January 14, 1976, (almost 9 months in advance of the rental due date). The BIA also provided appellant with a list of his numerous mining claims in the reservation showing anniversary date for each by which the rental payment is due. Appellant admits that he subsequently paid other claims at the appropriate time during the year, but that he somehow missed the subject claim. Thus, it was appellant's oversight rather than any conduct of the BIA which led to the invalidation of the claim. There was no failure on his part to understand what was required, and no reliance by him on

any past practice of the BIA. He simply forgot to pay the rental for this particular claim. Nor can we properly treat the small amount of the rental as de minimis. The rental for all such claims is small because the acreage of a claim is limited by statute, and the annual rental is fixed at only 5 cents per acre. Were we to excuse this appellant on the basis of the small amount of money involved, the discretion to invalidate for this reason would be lost, as all such claims are charged at the same rate.

We conclude that there is no basis for any equitable relief.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

As discussed in the majority opinion, the Department has discretion on whether the lease should be terminated. Departmental regulation 43 CFR 3825.1(b), supra, requires only that the payment be made "in advance each year." Here, appellant paid the $4.20 due for V. O. claims 2 through 5 approximately January 8, 1976. This payment should have been accepted by BIA since it was made in advance, i.e., during the year previous to the time due. There is no regulation which requires that payment be made only during the month previous to the final due date. Even if section 3825.1(b) could be so construed, it would be most ambiguous. In Wallace C. Bingham, 21 IBLA 266, 82 I.D. 377 (1975), the Board restated the established rule:

> The use of the word "permanent" in the regulation must be considered ambiguous at best if it is to be construed as imposing a requirement not articulated elsewhere in the law or the regulations. Regulations should be so clear that there is no basis for an applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory right. Louis Alford, 4 IBLA 277 (1972); Mary I. Arata, 4 IBLA 201, 78 I.D. 397 (1971). If there is doubt as to the meaning and intent of a regulation, such doubt should be resolved favorably to the applicant. Mary I. Arata, supra; A. M. Shaffer, 73 I.D. 293 (1966); Madge V. Rodda, 70 I.D. 481 (1963); William S. Kilroy, 70 I.D. 520 (1963) * * *. Had it been the intention of the Secretary to impose a mandatory requirement * * *, he could easily have done so by promulgating an explicit regulation to that effect. This has not been done.

82 I.D. at 384.

Subsequent to return of his rental, appellant made payments as directed by BLM but overlooked including the amount due on V. No. 3. This amount was apparently $1.05.

Departmental discretion must be exercised in a reasonable manner. I feel it would be unreasonable to terminate the claim for lack of payment of $1.05 -- when such payment had been previously properly tendered by appellant.

Joseph W. Goss
Administrative Judge